SUPREME COURT, U.S.
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No. 91-462

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

AUGUSTINE FERNANDEZ, Petitioner,

v.

BANK OF AMERICA,
NATIONAL TRUST AND SAVINGS ASSOCIATION, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL, STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT, DIVISION FOUR

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the construction of 12 U.S.C. section 85 by the United States Supreme Court in Daggs v. Phoenix National Bank (1900) 177 U.S. 549 and federal banking policy permit a national bank to charge the same rate of interest as a California state bank for a promissory note executed and the proceeds of which were disbursed in California.

RESPONDENT'S PARENT COMPANY AND NON-WHOLLY OWNED SUBSIDIARIES DIRECTLY HELD BY RESPONDENT

Respondent is a national trust and savings association, not a corporation, and therefore exempt from Supreme Court Rule 29.1.

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**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Respondent Bank of America National Trust and Savings Association ("respondent") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the California Court of Appeal opinion filed in the underlying action on April 12, 1991.

OPINION IN COURT BELOW

The opinion of the Court of Appeal for the State of California in the underlying action, which is not published in the Official Reports, is appended to petitioner's brief as Appendix A, to which respondent refers and incorporates by this reference. The Court of Appeal's denial of the petition for rehearing, filed on May 2, 1991, is appended to petitioner's brief as Appendix B, to which respondent refers and incorporates by this reference. The California Supreme Court's denial of the petition for review, filed on June 19, 1991, is appended to petitioner's brief as Appendix C, to which respondent refers and incorporates by this reference.

STATEMENT OF FACTS

Petitioner Augustine Fernandez ("petitioner") and a co-borrower (who is not a party to this petition nor to the appeal in the court below) executed a promissory note in the amount of $95,000. Respondent, a national bank, was the lender. The borrowers defaulted on the note, and respondent instituted the action in the court below to collect on the note, interest and for attorney's fees and costs.

The trial court entered a money judgment in favor of respondent and awarded attorney's fees and costs. Petitioner filed a timely notice of appeal to the California appellate court.

The sole issue on appeal was whether, pursuant to 12 U.S.C. section 85, the interest rate charged by

respondent was usurious because it exceeded 7%. The Court of Appeal affirmed the trial court's judgment in favor of respondent, and held that this Court's interpretation of the federal statute in question controlled the issue on appeal. The Court of Appeal denied petitioner's petition for rehearing.

Petitioner's petition for a hearing before the California Supreme Court was denied on June 19, 1991.

SUMMARY OF ARGUMENT

The Court should deny this petition because the California Court of Appeal, in affirming the trial court's judgment, adopted this Court's construction of the federal statute at the heart of the appeal.

REASON FOR DENYING THE WRIT

I. THE STATE APPELLATE COURT FOLLOWED THIS COURT'S CONSTRUCTION OF A FEDERAL STATUTE.

This petition should be denied because the California Court of Appeal, in affirming the trial court's judgment, adopted this Court's construction of the federal statute at the heart of the appeal. The appellate court fully recognized that where this Court had construed a federal statute, the state court's "discretionary powers vanish[], and [it] must yield to the principle that 'we are bound by interpretations of federal statutes by the United States Supreme Court.' [Citations omitted.]" (Petitioner's Appendix, p. A-5.) Because the only question presented by this petition concerns the very same issue presented to and decided by this

Court in Daggs v. Phoenix National Bank (1900) 177 U.S. 549, this Court should deny the petition.

Petitioner argues that the rate of interest a national bank may charge in California is limited to 7% because California has not fixed an interest rate by statute. Since the interest rate charged on the promissory note exceeded 7%, he argues that the rate was usurious. Petitioner bases his position on a federal statute that is part of the national banking act:

> Any association may . . . charge . . . interest at the rate allowed by the laws of the State . . . where the bank is located, . . . and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Chapter. When no rate is fixed by the laws of the State, . . . the bank may

> take, receive, reserve, or charge a rate not exceeding 7 per centum.

12 U.S.C. § 85 (hereinafter referred to as "Section 85").

The issue raised by petitioner was addressed and resolved nearly a century ago by this Court in Daggs v. Phoenix National Bank (1900) 177 U.S. 549. Contrary to petitioner's contention that Daggs is distinguishable, Daggs is directly controlling and binding on the issue before this Court.

The borrower in Daggs contended that state law did not fix any rate of interest, and therefore a national bank was limited to charging 7% interest by Section 85 (formerly Section 5197 of the Revised Statutes of the United States). In rejecting this contention, this Court declared:

> We cannot accept this as a correct interpretation of either the spirit or the words of the national banking act. By that act, certainly no discrimination was intended against national banks, and that the interpretation contended for would seriously embarrass their business is manifest.

Daggs, 177 U.S. at 555.

In Daggs, this Court interpreted Section 85 and established that "'**fixed by the laws**' must be construed to mean '**allowed by the laws,**' **not a rate expressed in the laws**." Id. at 555 (emphasis in original, underscoring supplied). Thus, as interpreted, the portion of Section 85 that is at issue reads, "when no rate is allowed by the laws of the state . . . , the [national] bank may . . . charge a rate not exceeding 7 per centum." Since California **does allow** any rate of

interest to be charged, this portion of Section 85 does not apply.

Instead, the relevant portion of Section 85 allows respondent, a national bank, to charge "interest at the rate allowed by the laws of the state . . . where the bank is located." 12 U.S.C. § 85; Daggs, 177 U.S. at 555. California allows a state or national bank, with a principal place of business in the state, to charge any rate of interest by exempting them both from the usury provisions set forth in the California Constitution. Cal. Fin. Code § 1504 (hereinafter referred to as "Section 1504"); Hiatt v. San Francisco National Bank (9th Cir. 1966) 361 F.2d. 504, 506, 507, cert. den. 385 U.S. 948, rehrg. den. 385 U.S. 1021. Section 1504 provides:

> Pursuant to the authority contained in Section 1 of Article XV of the California Constitution, the restrictions upon rates of interest contained in Section 1 of Article XV of the California Constitution shall not apply to any obligations of, loans made or arranged by, or forbearance of, **any state bank or national bank whose principal place of business is in the State of California**, which is authorized to transact a trust business, or any trust company authorized to engage in the trust business, when the bank or company is acting in its fiduciary capacity.
>
> This section creates and authorizes an exempt class of persons pursuant to Section 1 of Article XV of the [California] Constitution.

Cal. Fin. Code § 1504 (emphasis supplied).

Because respondent may charge the same rate of interest as a state bank, the interest charged to petitioner is not limited to 7%, nor is an interest rate above 7% usurious. This conclusion

is consistent with Congressional intent: "the intention of the national law is to adopt the state law, and permit to national banks what the state law allows to . . . the banks organized by it." Daggs, 177 U.S. at 555. This interpretation has retained its vitality and remains intact, as confirmed by the Ninth Circuit in Hiatt v. San Francisco National Bank (9th Cir. 1966) 361 F.2d. 504, cert. den. 385 U.S. 948, rehrg. den. 385 U.S. 1021.

Thus, because this Court's interpretation of Section 85 has been followed by the California appellate court, petitioner has no grounds for this petition and the writ should be denied.

CONCLUSION

As shown above, the issue raised in this petition has been definitively disposed of by the California Court of Appeal in conformance with this Court's interpretation of 12 U.S.C. section 85. This Court should therefore deny the petition for a writ of certiorari.

Dated: October 11, 1991

Respectfully submitted,

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